IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 2168 of 2006

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE STATE OF GUJARAT - Appellant
Versus
VIKRAMBHAI NANJIBHAI GAMETI – Respondent

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Appearance :
Mr.K.C.Shah, APP for the Appellant

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 29/08/2007

ORAL JUDGMENT (Per: HON'BLE SMT. JUSTICE ABHILASHA KUMARI)

1. This Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order dated 14th September, 2006, rendered by the learned Additional Sessions Judge, 2nd Fast Track Court, Sabarkantha at Himmatnagar in Sessions Case No.134 of 2005 whereby the respondent (original accused) came to be acquitted for the offences punishable under Sections 302 and 201 of the Indian Penal Code.

2. Briefly stated, the case of the prosecution is that the complainant – Bachubhai Nemaji Gameti filed a complaint on 14th May, 2005, at Vijaynagar Police Station to the effect that on 13th May, 2005, Naresh, the son of the complainant, had taken about 40 goats for grazing into Kherwada forest at about 10 o'clock in the morning. After he had gone into the forest, the complainant saw the accused – Vikrambhai Nanjibhai Gameti, who is the son of the elder brother of the complainant, going into Kherwada forest on a bicycle, with an axe tied on to it, at about 11:00 o'clock. The complainant was going to Idar and while he was on the road, he saw the accused, with an axe,

returning on his bicycle. Further, Martaji Nemaji, the elder brother of the complainant, and his daughter Manuben, who had also left for Idar before the complainant, also saw the accused going towards Kherwada forest. When the complainant returned to his house at about 7:00 o'clock in the evening, his wife Shardaben informed him that their goats had come back unattended at about 2:00 o'clock in the afternoon but their son Naresh had not returned and that the accused was also seen coming from the forest dressed in `Bandi' (Vest) with a kerchief tied around his neck, on a bicycle, with an axe. According to the wife of the complainant, the accused was also seen by Naranbhai Dhanjibhai Hadat near Shankar Dungri area of the forest. According to the narration in the complaint, there was a family dispute between the accused and the complainant regarding which a quarrel had taken place fifteen days prior to the incident when the accused had threatened to kill the complainant with an axe. At that time, a compromise was arrived at with the intervention of persons from the village but,

according to the complainant, the accused was nursing a grudge against him and was looking for an opportunity to kill his son. Therefore, according to the complainant, his son Naresh was killed by the accused in Kherwada forest when he had gone to graze his goats at that place. It is further narrated in the compliant that when the son of the complainant did not return home, the complainant and his elder brothers Maknaji and Natuji, other relatives and people from the village had gone to search for him in the Kherwada forest but were unable to find him. Early the next morning, when they had gone into the forest to search for Naresh, the dead body of Naresh was found in a hollow near the Shankar Dungri area, covered by dry leaves. It had injuries on the left side of the forehead, left shoulder and on the left side of the body.

3. Upon this complaint, the investigating machinery was put into motion. The statements of witnesses were recorded, inquest was held on the dead body of the deceased which was sent for autopsy, the Panchnama of the scene of offence was prepared and

at the end of investigation, as sufficient incriminating evidence was found against the accused, he came to be chargesheeted before the learned Judicial Magistrate, First Class, Khedbrahma.

4. As the offences punishable under Sections 302 and 201 of the Indian Penal Code were exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of learned Sessions Judge, Sabarkantha at Himmatnagar, which came to be registered as Sessions Case No.134 of 2005. The learned Additional Sessions Judge, to whom the case was made over for trial, framed the Charge (Ex.4), which was read over and explained to the accused, who pleaded “not guilty” to the same and claimed to be tried. Accordingly, the accused was put to trial. In support of the case of the prosecution, as many as thirteen witnesses came to be examined. After recording of the evidence of the prosecution witnesses was over, the learned trial Judge explained to the accused the statements appearing against him in the evidence of the prosecution witnesses and

recorded his further statement under Section 313 of the Code of Criminal Procedure, 1973. The defence of the accused was specifically to the effect that false evidence has been led against him and a false case has been foisted upon him. After hearing the parties and on appreciation and evaluation of the evidence on record, the learned trial Judge came to the conclusion that the prosecution has not been able to prove its case beyond reasonable doubt. Accordingly, the learned trial Judge acquitted the accused of the offences with which he was charged by giving him the benefit of doubt, which has given rise to the present Appeal.

5. We have heard Mr.K.C.Shah, learned Additional Public Prosecutor for the State at length and in great detail. We have also perused the Record and Proceedings of the trial Court which has been summoned and is available with us. At this stage also, we have undertaken a scrutiny of the vital features of the case, the reasonable probabilities arising out of the evidence recorded and have examined the reasons recorded by the trial Court for

recording the finding of acquittal.

6. Mr.K.C.Shah, learned Additional Public Prosecutor for the State, has submitted that the judgment and order of acquittal passed by the trial Court is contrary to law and the evidence on record inasmuch as that the oral and documentary evidence has not been properly appreciated. According to the Additional Public Prosecutor, it has come in the evidence that the accused was bearing a grudge against the complainant and the deceased due to a previous family dispute. According to him, the complainant has clearly deposed that the accused had gone towards Kherwada forest with an axe on his bicycle, after his son Naresh had gone there for grazing his cattle. Further, the accused was seen going towards the village with an axe, by witness Naranbhai Dhanjibhai, who had gone to the forest to collect fire-wood. The learned Additional Public Prosecutor has further submitted that the extra-judicial confession made by the accused before Nathabhai Rabari, Police Sub Inspector, Vijaynagar Police Station, to the effect that due to earlier family

dispute, he had inflicted knife blows to Naresh, has also not been properly appreciated by the trial Court. The Muddamal knife has been voluntarily produced by the accused and according to the medical evidence the injuries on the person of the accused could have been caused by the same. Therefore, according to the learned Additional Public Prosecutor, the chain of evidence implicating the accused and pointing only towards his guilt is complete and the Appeal against the order of acquittal deserves consideration and acceptance, and the Appeal be allowed.

7. In order to ascertain whether a prima-facie case is made out by the State for consideration and for admission of the Appeal, it is necessary to undertake a scrutiny of the evidence on the basis of which the trial Court recorded the finding of acquittal. We, therefore, consider it necessary to re-appreciate the evidence recorded during the trial in the light of the reasons recorded by the trial Court for acquittal.

8. The essence of the evidence of prosecution

witnesses is as follows.

The complainant Bachubhai Nemaji Gameti, PW 3, has been examined at Ex.24. He has reiterated the version given by him in the compliant that his son Naresh had gone to graze his goats in Kherwada forest and the accused was seen going into the forest on his bicycle with an axe and while he was standing on the road to go to Idar, the accused was seen returning on his bicycle with an axe, towards the village. The complainant has deposed that when he was sitting in the Jeep in order to go to Idar, the accused came from his house dressed in a vest with a kerchief tied around his neck and again went towards the forest on his bicycle. This witness has further deposed about the family dispute with the accused and has stated that there was a quarrel fifteen days prior to the incident when the accused had threatened to kill the complainant with an axe and knife which was compromised with the intervention of relatives and other persons from the village. According to the complainant, the accused used to roam around with the knife after the

incident. In his cross-examination, this witness has stated that the clothes which were worn by the accused when he went into the forest have not been seized by the Police. He has further stated that towards the East, behind his house, there is a big forest and many persons go regularly to that forest to collect fire-wood, leaves and to graze their cattle.

9. Exhibit 25 is the testimony of PW 4 – Sanjubhai Nemaji, who is one of the Panchas of the Panchnama of the scene of offence. According to this witness, on 14th May, 2005, he was called by the Police as a Panch at Shankar Dungri in Kherwada forest and Velaji Dhulaji was also accompanying him. This witness has categorically stated that the spot from where the dead body was found was pointed out by the accused.

10. Exhibit 28 is the Panchnama of the scene of offence. According to this Panchnama, this spot, from where the dead body was recovered, was pointed out by Lattubhai Nemaji Gameti and blood stained earth

was taken from that spot.

11. Exhibit 29 is the testimony of PW 5 Pujabhai Lalabhai Dabhi, who is one of the Panchas of the Panchnama for seizure of clothes of the deceased. This witness states that on 14th May, 2005, he was called to the Police Station at 10 o'clock in the morning and was made to sign on a paper in the presence of police personnel. He has identified his signature on Panchnama Ex.30, but has categorically stated that he has not seen anything else on the paper. He has denied seeing the Muddamal clothes before that day. He has specifically stated that apart from his signature, he does not know about the contents of the Panchnama. The testimony of this witness is, therefore, not of any help to the case of the prosecution.

12. Exhibit 32 is the testimony of PW 6 Chetansinh Nathusinh Kupavat, who is the other Panch of Panchnama at Ex.30. This witness does not support the version of the prosecution and has been declared hostile.

13. Therefore, from the evidence on record it is evident that the Panchnamas at Ex.28 and Ex.30 regrading the scene of offence and seizure of clothes of the deceased have not been satisfactorily proved by the prosecution.

14. Prosecution Witness No.7 Govindbhai Ramaji Kathodi, whose testimony is at Ex.33 and PW 8 Jagatsinh Panesinh Sisodiya, whose testimony is at Ex.35, are the Panchas of the Panchnama made for the recovery of knife. Both these Panchas have not supported the case of the prosecution and have been declared hostile. The Panchnama of recovery of knife at Ex.34 has, also not been satisfactorily proved by the prosecution.

15. Prosecution Witness No.9 Shardaben Bachubhai Nemaji, who is the mother of the deceased, has been examined at Ex.36. Her testimony does not disclose anything of significance, other than what is stated by the complainant.

16. The testimony of PW 10 Narayanbhai Dhanjibhai

Sadat at Ex.37 has been heavily relied upon by the prosecution. According to this witness, on the day of the incident, he had gone into Kherwada forest to cut fire-wood and when he was returning, he saw the accused on his bicycle in the Shankar Dungri area. The accused was going towards his house and this witness was behind him. According to this witness, when he was going to his home, he met the complainant who was going to Idar.

17. On the appreciation of the evidence as discussed above, the trial Court came to the conclusion that it has not been conclusively proved beyond reasonable doubt that the accused has committed murder of the son of the complainant in Kherwada forest. Merely because the accused was seen going into the forest on his bicycle with an axe, sometime after the deceased had gone there to graze his goats does not conclusively prove that he had committed the offence. The evidence of the complainant and PW 37 – Narayanbhai Dhanjibhai Sadat is merely to the effect that the accused was seen going into the forest and coming out of the forest on his bicycle with an

axe and from these circumstances, it cannot be proved that he alone had committed the murder of the deceased.

18. Regarding the extra-judicial confession purported to have been made by the accused to Nathabhai Govabhai Rabari, who was then PSI at Vijaynagar Police Station, it would be helpful to advert to the testimony of this witness who is examined as PW 13 at Ex.42. According to this witness, on the morning of 14th May, 2005, the accused came at Vijaynagar Police Station and stated that on account of the family dispute with Nareshbhai Bachubhai, son of his uncle, in Kherwada forest, he had given a knife blow to said Nareshbhai who had fallen down and he had run away from there. This information was recorded as Entry No.6 on Page No.62 of the Station House Diary which is produced at Ex.41. This witness categorically admits in his cross-examination that he has not recorded an FIR on this information. The learned trial Judge, while appreciating this piece of evidence, has come to the conclusion that extra-judicial confession made by the accused to a Police

officer is not admissible in evidence as provided by Section 25 of the Indian Evidence Act, 1872. The trial Court has, therefore, come to the conclusion that the chain of evidence incriminating the accused is not complete and has recorded a finding of acquittal, giving the accused the benefit of doubt.

19. After having carefully scrutinized the reasons recorded by the trial Court for the acquittal as aforesaid, in the light of evidence on record, and on re-appreciation of the evidence, both oral and documentary, we are of the considered view that there is no infirmity in the judgment and order of the trial Court. In order to reach this conclusion, we have carefully examined the circumstances which have been pointed out against the accused by the prosecution, which are as under:

(a) The complainant, in his testimony at Ex.24, has deposed that on 13th May, 2005, at about 10 o'clock in the morning, his son Nareshbhai had gone to graze his goats in Kherwada forest and the accused was also seen going towards the forest with an axe on his

bicycle.

(b) PW 10 Narayanbhai Dhanjibhai Sadat, in his testimony at Ex.37, has deposed that when he had gone to collect the fire-wood in Kherwada forest in the morning of 13th May, 2005, he saw the accused coming out of the forest on his bicycle with an axe and going towards his village. According to this witness, the accused was ahead of him.

(c) The accused was nursing a grudge against the complainant and his son due to a previous family dispute which had resulted in a compromise fifteen days prior to the incident.

(d) The accused had made a confessional statement before Nathabhai Govabhai Rabari, PSI of Vijaynagar Police Station, that due to previous family dispute, he had inflicted knife blows to Nareshbhai, who is son of his uncle, in Kherwada forest.

(e) The medical evidence reveals that the deceased had eight injuries on his body which could have been

caused by a knife which was recovered at the instance of the accused and on which blood of Blood Group `B' was found which is also the blood group of the accused.

Taking into consideration the circumstances (a) and (b), the only fact that can be deduced therefrom is that the accused was seen by the complainant and by witness Narayanbhai Dhanjibhai going into Kherwada forest on the morning of 13th May, 2005, after Nareshbhai, the son of the complainant had gone there to graze his goats and that the accused was seen by the complainant and PW Narayanbhai Dhanjibhai coming out of the forest on his bicycle with an axe. In fact, the complainant, in his testimony at Ex.24, clearly deposes that he saw the accused going to the forest, return therefrom, once again go into the forest and again saw him returning from there when he was going to Idar. It is not clear how many trips the accused is supposed to have made into Kherwada forest and back. The circumstances that the accused was seen going into and coming out of the forest are, therefore, not

conclusive to prove the guilt of the accused. PW 10 Narayanbhai Dhanjibhai states that when he was returning from forest after collecting fire-wood, he saw the accused on his bicycle going ahead of him towards the village. He does not state that the axe which the accused was carrying or his clothes had stains of blood. Neither has he seen anything suspicious in the forest, or about the accused. The only circumstance that is proved from the evidence of these witnesses is that the accused was seen going into the forest on his bicycle with axe and was seen coming out of the forest. Merely from this circumstance alone, it cannot be conclusively held that the accused alone and nobody else was responsible for committing the murder of the deceased. The complainant, in his cross-examination, has clearly stated that many persons used to come into the forest for collecting fire-wood, leaves, and for grazing their cattle. It is therefore clear that the forest was accessible to all the villagers who used to regularly go there for collecting fire-wood and grazing cattle. In fact, witness Narayanbhai

Dhanjibhai had also gone into the forest for collecting fire-wood. The evidence of the accused going into the forest on his bicycle with an axe and returning from there does not, in any manner, form a link in the chain of evidence against the accused.

The circumstance that the accused had a grudge against the deceased due to a previous family dispute also does not conclusively point towards his guilt. The complainant has deposed that a compromise was effected between him and the accused at the intervention of his relatives and other villagers and this written compromise has been produced at Ex.39. The previous dispute between the parties also does not point towards the guilt of the accused.

Regarding the confessional statement purported to have been made by the accused before the witness Nathabhai Govabhai Rabari, the same has not been reduced into an FIR for reasons best known to the said witness, even though it disclosed the commission of a cognizable offence. This omission casts a doubt on the veracity of the purported

confession. It is recorded in the Station House Diary but finds no mention in the FIR. In this regard, the observations of the Supreme Court in **Aghnoo Nagesia v. State of Bihar – AIR 1966 Supreme Court 119** are pertinent and are extracted below:

> *"9. Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in Ss. 24 to 30 of the Evidence Act and Ss. 162 and 164 of the Code of Criminal Procedure, 1898. Section 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in Ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confession caused by certain inducements, threats and promises. Section 25 provides: "No confession made to a police officer shall be proved as against a person accused of an offence". The terms of S. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence"*

covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by S. 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by S. 25 on a confession made to a police officer. Section 27 is the form of a proviso, and partially lifts the ban imposed by Ss. 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-s. (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of S. 27 of the Evidence Act. The words of S. 162 are wide enough to include a confession made to a police officer in the course of an

investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under S. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by S. 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under S. 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by S. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by S. 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy and the fullest effect should be given to them."

In view of the authoritative pronouncement of the Apex Court, the confession purported to have been made by the accused to this Police witness is not admissible in evidence against him and cannot be relied upon.

The circumstance regarding eight injuries on the

person of the deceased which could have been inflicted with Muddamal Article No.9 (knife) also does not conclusively prove the guilt of the accused. According to PW 1 Dr.Govindbhai Purushottamdas Patel, examined at Ex.7, the injuries on the person of the deceased could have been caused by the Muddamal knife. The recovery of the knife is also thrown into doubt as the Panchas thereof have been declared hostile. Moreover, the evidence suggests that the accused was seen going into Kherwada forest and coming out from the forest on his bicycle with an axe. However, the injuries are supposed to have been inflicted with a knife and not with an axe. The submission that the Blood Group `B' of the accused was found on the Muddamal knife is also not helpful in proving the guilt of the accused or that he alone had inflicted the injuries found on the body of the deceased.

These, in brief, are the circumstances which emerge from the evidence on record in this case.

20. As held by the Supreme Court in **Sharad Birdichand**

Sarda v. State of Maharashtra – AIR 1984 SC 1622, Head Note (E), the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as

not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

21. In the instant Appeal, there are no eye-witnesses to the crime and the case rests on circumstantial evidence alone. The evidence on record, as discussed in detail hereinabove, does not reveal that the circumstances against the accused are of a conclusive nature so as to exclude every hypothesis except that of the guilt of the accused. The chain of evidence is not complete and there are no connecting links which would persuade us to come to a conclusion inconsistent with the innocence of the accused and consistent only with his guilt. In fact, on careful scrutiny, we find that there are several missing links and glaring gaps in the evidence and, it cannot be said that there is a chain of evidence pointing towards the hypothesis of the guilt of the accused.

22. Even otherwise, it is a settled principle of law that if two views can be arrived at on the basis of evidence

on record, then the one favourable to the accused should be adopted. In the present case, as rightly recorded by the trial Court, the evidence on record does not lead to the conclusion of the guilt of the accused. We agree with this finding. Evaluating the evidence on record in the light of the five principles enunciated by the Supreme Court in the case of **Sharad Birdichand Sarda v. State of Maharashtra**, we do not find any infirmity in the view taken by the trial Court for recording the finding of acquittal. The reasons given by the trial Court are cogent, plausible and probable in the facts and circumstances of the case. The evidence has been properly appreciated and a correct conclusion has been arrived at. We, therefore, do not find any merit in this Appeal even at this stage and hence, we pass the following order.

23. Leave to Appeal refused. Appeal stands dismissed.

(J.R.Vora, J.)

(Smt.Abhilasha Kumari, J.)

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